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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

**FAIR POLITICAL PRACTICES
COMMISSION, AN AGENCY OF THE STATE OF
CALIFORNIA,**

Plaintiff,

v.

UNITED STATES POSTAL SERVICE,
Defendant.

Case No.:

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF FOR VIOLATION
OF THE FREEDOM OF INFORMATION
ACT, 5 U.S.C. § 552 et seq.**

INTRODUCTION

1. This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as amended, challenging the United States Postal Service's (the "USPS") improper withholding of agency records concerning the number of pieces of United States mail that a candidate in a California local election mailed out on certain dates.

2. This action seeks declaratory relief that defendant USPS violated FOIA by improperly withholding the requested records, and injunctive relief ordering the USPS to immediately make available and produce the requested records in their entirety without claiming any exemptions.

PARTIES

3. Plaintiff Fair Political Practices Commission (the “FPPC”) is an agency of the State of California. Cal. Gov’t Code § 83100, with a principal place of business in Sacramento, California. The FPPC has primary responsibility for the impartial, effective administration and implementation of the Political Reform Act of 1974 (the Act).¹ *Id.* § 83111. Pursuant to the Act, the FPPC regulates the political activities of public officials, contributors, campaign committees, lobbyists, and other groups to ensure compliance with campaign reporting and disclosure requirements, conflicts of interest regulations, and contribution limits to ensure that contributions are fully and truthfully disclosed to the public so that voters may be better informed and improper practices may be inhibited. Among other things, the FPPC is charged with investigating possible violations of the Act and bringing enforcement proceedings when it determines there is probable cause to believe a violation of the Act has occurred. *Id.* §§ 83115-83116.

4. Defendant USPS is an agency within the meaning of 5 U.S.C. § 552 and 5 U.S.C. § 702. The USPS is an independent establishment of the executive branch of the federal government charged with running the postal services of the United States. 39 U.S.C. §§ 201, 403. The USPS may sue and be sued in its official name. *Id.* § 401.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action and personal jurisdiction over the USPS pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(C)(I). This Court has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331 and has original jurisdiction based on an agency of the United States government being a defendant pursuant to 28 U.S.C. § 1346(a)(2).

6. Federal courts have jurisdiction over FOIA actions under 5 U.S.C. § 552(a)(4)(B.). That section states, in pertinent part: “On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding

¹ The Political Reform Act is contained in California Government Code sections 81000 through 91014. All further statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

1 agency records and to order the production of any agency records improperly withheld from the
2 complainant.”

3 7. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B). The FPPC’s principal place of
4 business is in Sacramento, which is in the Eastern District of California.

5 **FACTS**

6 8. On November 10, 2008, the FPPC received a sworn complaint against William Eisen
7 (Respondent) alleging violations of the mass mailing provisions of the Act in connection with a local
8 California campaign. The complaint specifically alleged that Respondent produced and distributed
9 mass mailings that contained improper sender identification information in violation of California
10 Government Code Section 84305.

11 9. California’s mass mailing restrictions provide, in part, that “no candidate or committee
12 shall send a mass mailing unless the name, street address, and city of the candidate or committee are
13 shown on the outside of each piece of mail in the mass mailing and on at least one of the inserts
14 included within each piece of mail of the mailing in no less than 6-point type which shall be in a color
15 or print which contrasts with the background so as to be easily legible.” Cal. Gov’t Code § 84305.
16 The California Supreme Court has unequivocally held that the mass mailing prohibitions serve the
17 compelling state interests of providing the voters with information to aid them in making their choices
18 at the ballot box, “the ultimate expression of their First Amendment rights,” and preventing corruption
19 of the electoral process. *Griset v. Fair Political Practices Comm’n*, 8 Cal. 4th 851, 862-66 (1994).

20 10. Further investigation revealed evidence that Respondent produced and sent two separate
21 mailings opposing his recall in the November 2008 election. Instead of properly identifying himself as
22 the sender, Respondent falsely indicated that a taxpayers’ association and regional political club were
23 responsible for the mailers. Respondent rented and controlled post office boxes and sent out the
24 mailings using his bulk mail account from the USPS.

25 11. In order to vigorously enforce the provisions of the Act, the FPPC may subpoena
26 witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence,
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1 and require by subpoena the production of any books, papers, records or other items material to the
2 performance of the Commission's duties or exercise of its powers. Cal. Gov't Code §§ 81002, 83118.

3 12. On July 7, 2010, to acquire more information, ascertain the gravity of the public harm,
4 and determine whether the mailings were in fact deemed a mass mailing under the definition set forth
5 in the Act², Tino Salinas, an FPPC investigator, sent a subpoena duces tecum to the USPS for the
6 number of pieces of mail related to the Respondent's bulk mailing permit number that the USPS on or
7 around the 9th, 10th, and 22th of October in 2008.

8 13. On August 10, 2010, Parin Patel, a USPS attorney from the Long Beach office, called
9 Mr. Salinas to advise that she had forwarded the FPPC document request to Beverly Young in the
10 USPS Los Angeles office, as she is the custodian of records. Mr. Salinas called and spoke with Ms.
11 Young, who advised Mr. Salinas to submit the information requested in the July 2, 2010 subpoena as a
12 FOIA request.

13 14. On August 11, 2010, the FPPC submitted a FOIA request to the Los Angeles USPS
14 Business Mail Entry Division for the number of pieces of mail related to the Respondent's bulk
15 mailing permit number that the USPS delivered on or around the 9th, 10th, and 22nd of October in
16 2008.

17 15. On October 15, 2010, Geraldine O. Rowe, Pacific Area USPS Deputy Managing
18 Counsel, called Mr. Salinas and advised that the USPS would not be able to comply with the FPPC's
19 request for documents despite the subpoena.

20 16. On November 2, 2010, in response to the FPPC's request, the USPS sent copies of three
21 Postage Statements – Standard Mail forms (PS Form 3602) with nearly all of the contents redacted,
22 including the "Total Pieces" section of the forms. Regarding the redactions, the USPS cited FOIA
23 disclosure exemptions pertaining to information of a commercial or financial nature that are privileged
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27 ² Section 82041.5 defines a mass mailing to include over two hundred substantially similar pieces of mail.
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1 and confidential or would not be publicly disclosed under good business practices (FOIA Exemptions
2 3 and 4).³

3 17. On November 17, 2010, Ms. Rowe sent an email to Zachary Norton, FPPC Commission
4 Counsel, declaring that the Postal Service's response to the FPPC's inquiry for records is not affected
5 by the fact that the FPPC is a government entity that issued a subpoena. Further, Ms. Rowe stated that
6 the USPS is to follow 39 C.F.R. Section 265.12, which explains that requests for records are reviewed
7 under FOIA.

8 18. On November 23, 2010, the FPPC appealed the USPS decision by letter to the Chief
9 Counsel of Customer Programs, reasoning that the FOIA exemptions were inapplicable because the
10 mailings were not sent out by a business entity or other commercial enterprise and the information
11 requested (the number of pieces delivered) would not constitute trade secrets or other commercial or
12 financial information.

13 19. On January 10, 2011, the USPS affirmed its position with regard to the exemptions for
14 the reason that the information contained on PS Form 3602, including the total number of pieces
15 mailed, is considered to be proprietary in nature and it would not be a good business practice to
16 disclose.

17 20. On May 17, 2011, the FPPC wrote to the Office of Government Information Services
18 (OGIS) requesting a review of the USPS's denial of information. The FPPC, in opposition to the
19 USPS's argument, maintained that the disclosure of the number of pieces mailed and date mailed,
20 while integral to the FPPC's investigation, would neither divulge trade secrets or other commercial or
21 financial information, nor reveal any proprietary information concerning the USPS's delivery
22 schedules, routing, or other business practices. Further, the FPPC requested OGIS to review the USPS
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26 ³ "Exemption 3" allows agencies to withhold records that are specifically exempted from disclosure by another
27 statute. 5 USC § 552(b)(3). In this case, USPS cited 39 USC § 410(c)(2), which exempts from release "information of a
28 commercial nature, including trade secrets, whether or not obtained from a person outside the postal service, which under
good business practice would not be publicly disclosed." "Exemption 4" concerns "trade secrets and commercial or financial
information obtained from a person and privileged or confidential." 5 USC § 552(b)(4).

FOIA disclosure policies in general, as they do not seem to comport with President Obama's "presumption favoring disclosure".⁴

21. On or around July 15, 2011, Mr. Norton spoke with Corinna Zarek, OGIS Attorney Advisor, to apprise her of the situation. He stated that if specific details of the FPPC request for information were not disclosable, a confirmation of whether or not the total number of pieces mailed was over or under 200 would suffice. On September 17, 2011, Miriam Nisbet, Director of OGIS, responded to the May 17 request for review. After contacting FOIA professionals and USPS General Counsel, Ms. Nisbet concluded that the USPS's action appeared to be an appropriate application of Exemptions because, unlike more traditional Executive Branch agencies, the USPS is a self-serving corporation owned by the United States Government intended to generate revenue.⁵ As a revenue-generating entity, the USPS has commercial considerations that other agencies may not have and properly applied the Exemptions under the guise of good business practices.

22. California, twelve other states,⁶ and the Federal Elections Commission⁷ all regulate mailed political communications with regard to either the number of mailed pieces or dollar amount spent on the mail pieces before being categorized as a mass mailing. Without compliance from the USPS, neither these 13 states, nor the federal government will be able to determine whether a mailing

⁴ On January 21, 2009, President Obama transmitted a memorandum regarding FOIA to the heads of executive departments and agencies. This memorandum stated that FOIA is the most prominent expression of a profound national commitment to ensuring an open government; that in the face of doubt, openness prevails; and that FOIA should be administered with a clear presumption in favor of disclosure. These concepts were reiterated in the March 19, 2009 memorandum from the Office of the Attorney General. The Attorney General expounded upon President Obama's "Presumption of Openness," stressing that an agency should not withhold information simply because it may do so legally; an agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption; the disclosure provision is not absolute; exemptions are in place to protect national security, personal privacy, privileged records, and law enforcement interest; and the Department of Justice will defend a denial of a FOIA request *only* if the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions or disclosure is prohibited by law.

⁵ Recent reports state that the USPS has suffered losses of approximately \$5.1 billion in the past fiscal year.

⁶ The twelve states include: Alabama (Ala. Code § 17-5-2 (4)), Alaska (Alaska Stat. Ann. § 15.13.400 (3)), Maryland (MD ELEC LAW § 13-306 (a)(3)), Massachusetts (Mass. Gen. Laws Ann. ch. 55, § 1), Michigan (Mich. Comp. Laws Ann. § 4.415 Sec. 5. (8)), Nebraska (Neb. Rev. Stat. § 49-1474), North Carolina (N.C. Gen. Stat. Ann. § 163-278.38Z(7)), Ohio (OH ST § 3517.211(A)), Oklahoma (OK ST Ethics Commission 257:10-1-3(e)), Oregon (Or. Rev. Stat. Ann. § 260.005(13)), Tennessee (Tenn. Code Ann. § 3-1-120(b)(2)), and Vermont (Vt. Stat. Ann. tit. 17, § 2893).

⁷ Per the Federal Elections Commission, the term "mass mailing" means a mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period. 2 U.S.C.A. § 431 (23)

1 is in violation of their respective laws. The USPS denial of these claims will effectively shut down
2 enforcement of state and federal laws regarding campaign communication disclosure on mass
3 mailings, thereby depriving the public of the ability to identify and take action against persons in
4 violation of these laws.

5 23. The unsupportable denial by the USPS, and the affirmation of the denial by the OGIS, to
6 provide the limited information sought by the FPPC pursuant to the investigation into its illegal mass
7 mailing case entirely frustrates the State's compelling interest in preserving the integrity of its election
8 process.

9 **CLAIM FOR RELIEF**

10 **Improper Withholding of Agency Records – 5 U.S.C. § 552**

11 24. Plaintiff re-alleges the allegations contained in paragraphs 1-23.

12 25. Defendant is currently in possession and control of the records plaintiff requested.

13 26. Defendant has refused and continues to refuse to provide plaintiff with the requested
14 records in violation of 5 U.S.C. § 522(a)(3)(A).

15 27. Plaintiff has exhausted all administrative remedies available.

16 28. Defendant's improper withholding of the records plaintiff requested constitutes a
17 violation of 5 U.S.C. § 552, as such records are subject to disclosure and production and none of the
18 exemptions, whether or not defendant claimed them, apply to such records.

19 29. The legal standard of de novo review applies, and the burden of proof justifying
20 withholding is on defendant. 5 U.S.C. § 552(a)(4)(B).

21 **PRAYER FOR RELIEF**

22 WHEREFORE, Plaintiff respectfully requests that this Court enter an order:

23 30. Declaring defendant USPS violated FOIA by improperly withholding the requested
24 records;

25 31. Declaring defendant violated FOIA by improperly relying upon Exemptions 3 and 4 and
26 39 U.S.C. § 410(c)(2);
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32. Declaring that defendant's actions in denying plaintiff's requests were "so flagrant to be arbitrary and capricious," and making a specific finding of that fact.

33. Enjoining defendant from asserting Exemption 3 and 4 of FOIA and 39 U.S.C. § 410(c)(2) in response to the FPPC's request;

34. Directing defendant to immediately disclose and produce copies of the requested records to plaintiff;

35. Awarding plaintiff reasonable attorneys fees and costs incurred in this matter pursuant to 5 U.S.C. § 552(4)(E)(i); and

36. Granting plaintiff such other and further relief as the Court deems just and proper.

Dated: January 12, 2012

Respectfully Submitted,

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Chief, Enforcement Division

/s/ Heather M. Rowan
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